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No. 96-367

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

D.J. (BUD) WHITE,

Petitioner,

vs.

RUSH HEALTH SYSTEMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

CORPORATE DISCLOSURE STATEMENT

Respondent Rush Health Systems, Inc. is a privately-held, nonprofit corporation. None of the affiliates or subsidiaries of Rush Health Systems, Inc. has issued shares to the public. All of Rush Health Systems, Inc.'s subsidiaries are wholly owned, except Specialized Management Services, which is a joint venture between Rush Service Company, Inc. (a wholly-owned subsidiary of Rush Health Systems, Inc.) and F.G. Riley Memorial Hospital.

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Respondent, Rush Health Systems, Inc., respectfully requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Fifth Circuit Court of Appeals. The court of appeals' opinion is unpublished, but is reprinted as appendix B to the petition. (For convenience of the Court, all citations to the opinion will be to the petition's appendix).

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari. Despite petitioner's claim of a conflict among the circuits, all circuits apply the same standard for constructive discharge, which requires proof of working conditions so intolerable that a reasonable person would have been compelled to resign. It is undisputed in this case that petitioner suffered no cut in pay or hours or loss of title and that the only change in working conditions was a realignment in his work duties which was caused by the computerization of his department. No court has held that a change in work duties alone amounts to constructive discharge.

A. Course of Proceedings and Disposition of the Case Below.

Respondent operates a large hospital in Meridian, Mississippi. Petitioner worked for respondent for twenty-eight years, the last several years as purchasing agent. On March 17, 1994, he retired. He was 65 years old.

The summer before petitioner's retirement, respondent began converting its manual purchasing and inventory system to a computerized system. Computerization significantly affected the job duties of everyone in the purchasing department and it specifically eliminated many of the manual

tasks petitioner had performed for years. A new position, materials manager, was created to supervise and coordinate the newly computerized purchasing and inventory system. Petitioner was not qualified for the job, nor did he seek it. Rick Beasley was transferred into the new position.

Petitioner openly opposed the computerization and complained that his job duties were being cut. Respondent's president assured him a month before his retirement that he wanted him to continue working as long as he chose to do so. On March 15, 1994, respondent's human resources manager and chief financial officer met with petitioner and presented him with a written list of duties that they expected him to perform in the future. Instead, the petitioner chose to ignore his new duties without even attempting to perform them, and filed an EEOC charge; he retired only two days later.

Petitioner filed this case in the United States District Court for the Southern District of Mississippi, Jackson Division against respondent, as well as several officers and employees of respondent. He claimed that he was constructively discharged on account of his age. Following discovery, respondent moved for summary judgment on the ground that there was no evidence that petitioner was constructively discharged.

The district court granted summary judgment on the issue of constructive discharge. (Pet. App. at 13a-14a). The district court also dismissed petitioner's claim against the individual defendants. (Pet. App. at 12a).

The Court of Appeals for the Fifth Circuit affirmed. It likewise noted that petitioner could not show constructive discharge on the evidence presented: "Accepting [petitioner's] testimony as true, at most, [petitioner] can only demonstrate that his job functions were given to other employees. It is

undisputed that he retained his job title, salary, benefits, and hours. Consequently, none of the usual indicia of a constructive discharge are present." (Pet. App. at 5a). The court of appeals further held that petitioner failed to pursue internal grievance procedures that are a prerequisite to resigning for constructive discharge. (Pet. App. at 6a). Petitioner did not appeal the dismissal of the individual defendants.

Petitioner subsequently filed a suggestion for rehearing en banc. That suggestion was denied without opinion. (Pet. App. at 2a).

B. Correction of Misstatements in the Petition.

The opinion of the court of appeals correctly summarizes the facts of the case and the evidence presented on respondent's motion for summary judgment. In the interest of brevity, respondent directs the Court to the appellate court opinion.

Pursuant to United States Supreme Court Rule 15.1, respondent brings the following misstatements of fact to the Court's attention.

Petitioner states that respondent forced him into retirement. (Petition at 3-4). This, of course, is the ultimate claim in issue, and a claim that the evidence sharply undercuts. Petitioner was repeatedly asked at his deposition what working conditions forced him to retire. The only condition he identified was an alleged reduction in his work duties. It is undisputed that petitioner was never asked to retire; he was not even questioned about his retirement plans. He suffered no loss of pay or benefits. His hours were not cut. He experienced no loss of rank or title. The courts below relied on these undisputed facts in rejecting his claim of forced retirement.

In fact, petitioner even undercut his own claim that his resignation was due to the change in his work duties. When questioned at his deposition about the EEOC charge he filed before resigning, he testified that his resignation had less to do with his working conditions than his unsupported belief that resigning was a prerequisite to suing his employer:

> Q. But nobody told you to walk, did they?
>
> A. Well, I know I can't sue a company and continue to work there.
>
> Q. But you did continue to work there. Nobody told you to quit, did they?
>
> A. No, but I knew I couldn't stay any longer because the process was running its course; and it was a matter of time when I entered the letter into court that I'd have had to have quit.
>
> Q. Well, is that what you meant by the wording in your resignation that — I think you said something about "due to the EEOC actions"?
>
> A. Correct.
>
> Q. And you felt since you had filed this charge that you were forced to quit?
>
> A. I would be, yes.
>
> Q. But you were speculating. Nobody told you you had to quit.

A. Well, I think the sun's out there too. That's speculation.

Q. Well, but I—

A. Nobody told me anything to my face about anything.

The only other evidence the petition mentions is respondent's alleged failure to train him on the new computer system. Petitioner quotes two affidavits to support this claim. (Petition at 3-4). There were two reasons these affidavits did not defeat summary judgment. First, petitioner never testified that the lack of computer training had anything to do with his decision to retire; at his deposition, he blamed his decision to retire on the alleged reduction in his work duties and his belief that resigning was a prerequisite to a lawsuit.

Second, one of the affiants, Cossondra Moffett, recanted her affidavit testimony at her deposition. Although she stated in her affidavit that petitioner was denied computer training, she confessed at her deposition that she had actually trained him on the computer system herself. She further testified that this training taught him all he needed to know about the computer system to perform his job. In light of Ms. Moffett's admissions at her deposition, petitioner's affidavits did not constitute competent summary judgment evidence. *See Darnell v. Target Stores*, 16 F.3d 174, 177 (7th Cir. 1994) (affidavit contradicted by subsequent deposition testimony does not create an issue of fact).

REASONS FOR DENYING THE WRIT

I.

RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT UNDER ANY CIRCUIT'S STANDARD FOR CONSTRUCTIVE DISCHARGE.

Petitioner claims respondent terminated him in violation of the Age Discrimination and Employment Act of 1967, 29 U.S.C. § 621, *et seq*. Since petitioner has never contended that respondent actually discharged him, he had to show that respondent constructively discharged him. The district court and court of appeals held that petitioner did not create a genuine issue of fact on the issue of constructive discharge.

Petitioner's claim of constructive discharge boils down to one claim: That respondent forced him into retirement by reducing his work duties. Petitioner was repeatedly asked at his deposition to identify the conditions he claims forced him to quit. Aside from his mistaken belief that his lawsuit against respondent required his resignation, the only condition petitioner could identify was the alleged reduction in his work duties during and after the computerization of the purchasing system. He suffered no cut in pay or hours. He suffered no change in title, rank or position. He was not demoted. He was not asked to retire or even questioned about his retirement plans. There is no evidence that his work performance was criticized. Finally, petitioner offered no evidence that he was qualified for, or that he even sought, the position of materials manager, the position created to supervise the newly computerized purchasing system.

The district court and court of appeals held that petitioner's allegations do not establish a constructive discharge. Despite

petitioner's claim of a conflict among the lower circuits, respondent would have received summary judgment in any circuit. The circuits have unanimously embraced an objective standard of intolerable working conditions in constructive discharge cases. Specifically, an employee must prove that working conditions were so intolerable that a reasonable employee would have felt compelled to resign.[1] *Greenberg v. Union Camp Corp.*, 48 F.3d 22, 27 (1st Cir. 1995); *Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070 (3d Cir. 1992); *Blistein v. St. John's College*, 74 F.3d 1459, 1468 (4th Cir. 1996); *Barrow v. New Orleans Steamship Ass'n.*, 10 F.3d 292, 297 (5th Cir. 1994); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 515 (6th Cir. 1991); *Darnell v. Target Stores*, 16 F.3d 174, 177 (7th Cir. 1994); *Smith v. World Ins. Co.*, 38 F.3d 1456, 1460 (8th Cir. 1994); *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996), *cert. denied*, __ S. Ct. __, 65 USLW 3085 (Oct. 15, 1996) (No. 96-70); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752 (11th Cir. 1996); *Simpson v. Federal Mine Safety & Health Review Comm'n*, 842 F.2d 453 (D.C. Cir. 1988). Petitioner's evidence did not amount to the creation of intolerable working conditions, no matter how interpreted.

A mere change in work duties does not create intolerable working conditions that would compel a reasonable person to resign. *See Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994)

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1. Some circuits also appear to require the employee to offer evidence that the employer imposed the intolerable conditions in a deliberate attempt to force the employee to resign. *E.g., Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993). The Fifth Circuit does not require proof of specific intent and the court below did not require petitioner to offer such evidence. This purported conflict is thus immaterial to the decision of petitioner's case.

(dissatisfaction with work assignments no basis for constructive discharge); *Stetson v. NYNEX Service Co.*, 995 F.2d 355, 360 (2d Cir. 1993) ("A constructive discharge generally cannot be established, however, simply through evidence that an employee was dissatisfied with the nature of his assignments."). *See also Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1082 (3d Cir. 1992) (proposed reassignment of reporter from courthouse beat to "demeaning" general reporting assignment not constructive discharge, especially since proposed reassignment involved no loss of pay or change in title); *Jett v. Dallas Ind. School Dist.*, 798 F.2d 748, 755 (5th Cir. 1986), *aff'd in part & rev'd in part on other grounds*, 491 U.S. 701 (1989) (coach stripped of coaching responsibilities and reassigned to another school not constructively discharged).

Two courts have squarely rejected the claim that a reduction in duties — even a substantial reduction — creates objectively intolerable working conditions. In *Pena v. Battleboro Retreat*, 702 F.2d 322 (2d Cir. 1983), the Second Circuit reversed a jury verdict for the plaintiff in an ADEA case. The plaintiff announced her retirement plans a year in advance. The defendant hired a younger replacement and transferred virtually all of the plaintiff's duties to the replacement. The plaintiff contended this left her with too little to do and quit before her planned retirement. The Second Circuit held that these were not intolerable working conditions, pointedly noting that the plaintiff suffered no loss of pay or change in title. *Id.* at 325.

In *McCann v. Litton Systems, Inc.*, 986 F.2d 946 (5th Cir. 1993), the Fifth Circuit rejected the plaintiff's claim that he was constructively discharged when he retired from his senior engineering position. Management had given him the option of either retiring or transferring to a new position under a much

younger man. The plaintiff alleged that the new position was not well-defined, that he would be left with little to do, and that he would be deprived of his secretary and subordinates. The Fifth Circuit held that the loss of supervisory responsibilities — even when coupled with a slight decrease in pay — did not constitute constructive discharge. *Id.* at 952.

Petitioner implicitly proposes a standard for constructive discharge under which any significant restructuring of job duties creates a claim for constructive discharge, even if the employee suffered no loss of pay. This standard would virtually handcuff employers and restrict them from even altering the job duties of anyone over forty years of age. Employers must retain the flexibility to arrange their employees' workloads. As the Third Circuit has observed, "The ADEA must not be permitted to become a mechanism to inhibit ordinary managerial decisions." *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1082 (3d Cir. 1992). Petitioner's proposed standard would not only stifle management flexibility, it would also penalize employers who humanely keep employees on salary during times of little work.

Petitioner ignores another, independent basis for the holding below. Respondent offered evidence that its human resources manager and vice president met with petitioner in March, 1994. They presented him with a written list of job duties that he would continue to perform post-computerization. They intended this action to assuage his concerns that he would not have much to do in the future. Instead, petitioner turned his back on management's attempts to define his job duties and resigned only two days after the meeting. He offered no evidence that these reassurances were an empty gesture. The court below held that petitioner had a duty to pursue internal grievance procedures before claiming constructive discharge. (Pet. App. at 6a) (citing *McKethan v. Texas Farm Bureau*, 996

F.2d 734, 741 (5th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994)). Other circuits broadly recognize that an employee who quits without giving his employer a reasonable chance to work out the problem has not been constructively discharged. *E.g.*, *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1994); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) ("A constructive discharge will generally not be found if the employer is not given sufficient time to remedy the situation."). Petitioner has not challenged this holding. He certainly has not explained how it is inconsistent with the decisions of this Court or other circuits.

II.

THE OPINION BELOW DID NOT VIOLATE FIFTH CIRCUIT PRECEDENT.

Petitioner also complains the Fifth Circuit panel failed to follow its own decision in *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292 (5th Cir. 1994). The Fifth Circuit apparently does not agree: No judge in active service on the Fifth Circuit voted to rehear the case. (Pet. App. at 2a). Respondent respectfully submits that the Fifth Circuit is capable of policing its own precedent.

In any event, the decision below does not violate *Barrow*. The *Barrow* court listed seven factors it considered relevant to a determination of constructive discharge:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to

> encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not.

Id. at 297.

Petitioner apparently interprets *Barrow* to mean that evidence of any one of these factors creates a jury issue on constructive discharge. Under this interpretation, for example, a pay cut alone would support a claim for constructive discharge. This grossly misinterprets the court's decision. While the Fifth Circuit identified these factors as relevant, it did not state what combination of factors is necessary to make out a *prima facie* case of constructive discharge. Because the employee in *Barrow* offered no evidence as to any of the factors, the Fifth Circuit did not reach that question.

To the contrary, other Fifth Circuit decisions have made it clear that a bare offer of proof as to one or more of these factors does not make out a claim for constructive discharge. As discussed above, the Fifth Circuit held in *McCann* that a substantial cut in job duties, even coupled with a slight decrease in pay, does not constitute a constructive discharge. *McCann v. Litton Systems, Inc.*, 986 F.2d 946, 952 (5th Cir. 1993). Similarly, the Fifth Circuit held in *Jett* that the reassignment of an employee to other job duties does not constitute a constructive discharge. *Jett v. Dallas Ind. School Dist.*, 798 F.2d 748, 755 (5th Cir. 1986), *aff'd in part & rev'd in part on other grounds*, 491 U.S. 701 (1989). The ultimate question is always whether the employee's resignation was "reasonable under all the circumstances." *Barrow*, 10 F.3d at 297. Because the court below found that "[u]nder the particular circumstances, no reasonable employee would have felt compelled to resign," (Pet. App. at 6a), the decision below is fully consistent with *Barrow* and other Fifth Circuit precedent.

CONCLUSION

The Circuit Court of Appeals for the Fifth Circuit correctly applied the intolerable working conditions standard in deciding this case, which is the standard uniformly applied by all circuits. Since petitioner was unable to offer proof that his working conditions were intolerable where there was no change in pay, hours, benefits or title other than a mere restructuring of his job duties, the courts below correctly held that he was not constructively discharged. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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